

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
NORTHWEST COMMUNICATIONS)	File Nos. 20020820AAG, 20020820AAH,
COOPERATIVE)	20020820AAI, and 20020820AAJ
)	
Certifications of Completion of Construction of)	
Multipoint Distribution Service Stations)	
WMX663 and WMX664, Bowbells, North)	
Dakota, and WMX665 and WMX666, Epping,)	
North Dakota)	
)	
PACE TELECOMMUNICATIONS)	File No. 20030129AAD
CONSORTIUM)	
)	
Certifications of Completion of Construction of)	
Instructional Television Fixed Service Station)	
WLX374, Indian River, Michigan)	
)	
CHEBOYGAN-OTSEGO-PRESQUE ISLE)	File Nos. 20030129AAB,
EDUCATIONAL SERVICE CENTER)	20030129AAC
)	
Certifications of Completion of Construction of)	
Instructional Television Fixed Service Stations)	
WNC702, Charlevoix, Michigan and WHR997,)	
Topinabee, Michigan)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 2004

Released: December 10, 2004

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On August 20, 2002, Northwest Communications Cooperative (NCC) filed a Petition for Waiver of Sections 21.43 and 21.44 of the Commission's Rules and associated late-filed certifications of completion of construction.¹ Similarly, on January 29, 2003, PACE Telecommunications Consortium (PACE)² and Cheboygan-Otsego-Presque Isle Education Service District (COPESD)³ filed certifications

¹ Request for Waiver, filed in association with File Nos. 20020820AAG, 20020820AAH, 20020820AAI, 20020820AAJ (filed Aug. 20, 2002) (NCC Waiver Request).

² See File No. 20030129AAD (filed Jan. 29, 2003).

³ See File Nos. 20030129AAB and 20030129AAC (filed Jan. 29, 2003).

of completion of construction and associated waiver requests. For the reasons discussed below, we grant the waiver requests and direct processing of the associated certifications.

II. BACKGROUND

2. On November 1, 1994, NCC was granted conditional licenses to operate Multipoint Distribution Service (MDS)⁴ stations WMX663 and WMX664 in Bowbells, North Dakota and WMX665 and WMX666 in Epping, North Dakota. NCC was required to construct and file a certification of completion of construction within one year from the date of authorization.⁵ NCC asserts that it did indeed construct the stations, but upon filing applications for renewal of these authorizations, it realized that the necessary certifications of completion of construction had never been filed due to an oversight.⁶ NCC requests a waiver of Sections 21.43 and 21.44 for the Commission to accept and process its certifications so that the necessary renewal applications can also be processed.⁷

3. We have a similar request before us from COPESD, who inadvertently neglected to file a construction certification for its Instructional Television Fixed Service (ITFS) Station⁸ WNC702 in Charlevoix, Michigan although it had timely constructed the station.⁹ COPESD asserts that because the station serves approximately 18,000 students in a geographically isolated, academically under-served area and does not lease out any excess capacity, denial of its waiver request would be greatly detrimental to the community.¹⁰

4. We also have before us late-filed certification of construction from COPESD for ITFS Station WHR997 in Topinabee, Michigan,¹¹ and from PACE for ITFS Station WLX374 in Indian River, Michigan.¹² In both cases, the Petitioners filed minor modification applications to request registration of certain receive sites that were up to 57 miles away from the main transmit site. This registration was necessary in order to receive protection from interference from neighboring stations. At the time COPESD and PACE's applications were granted in 2001, the referenced receive sites were operational

⁴ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing MDS and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*BRS/EBS Order*). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Once the new rules become effective, we will no longer refer to these services as MDS and ITFS.

⁵ 47 C.F.R. § 21.44.

⁶ See NCC Waiver Request.

⁷ *Id.*

⁸ See n.4, *supra*.

⁹ File No. 20030129AAB.

¹⁰ *Id.* at Exhibit 1.

¹¹ File No. 20030129AAC.

¹² File No. 20030129AAD.

pursuant to developmental authority.¹³ Thus, COPESD and Pace assert that they did not believe it was necessary to submit certification notices.¹⁴ Both Petitioners have filed the instant certifications in order to ensure that the Commission's records are complete.

III. DISCUSSION

5. Section 74.34¹⁵ of the Commission's Rules requires ITFS licensees to notify the Commission upon completion of any authorized construction. Similarly, Sections 21.43¹⁶ and 21.44¹⁷ of the Commission's Rules require MDS licensees to notify the Commission upon completion of any authorized construction. In NCC's case, Section 21.44(a) of the Commission's Rules provides that licenses automatically cancel if a timely construction notification is not filed.¹⁸ The Petitioners, who have not filed timely Certifications of Construction, seek waivers of these provisions so that their late-filed Certifications will be accepted and their licenses will remain intact.¹⁹ For MDS licensees, we may grant such a waiver if the purpose of the rule will not be served or would be frustrated by its application in the case and that grant of the waiver is otherwise in the public interest.²⁰ For ITFS licensees, "An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.'"²¹ We conclude that a waiver is warranted under the circumstances presented. Specifically, we conclude that the underlying purpose of the subject rules would not be served by strict application of the rule to the instant cases, and grant of a waiver would be in the public interest.

6. The purpose of the construction notification is to confirm that licensees have met their responsibility, not to cancel the licenses for legitimately operating facilities. The Petitioners in the instant case met their actual construction obligations in a timely manner, but neglected to notify the Commission of the completion of such construction. Considering the circumstances, we conclude that the best approach is to grant Petitioners the waiver they seek in order to allow acceptance of pending late-filed construction notifications. The late-filed certifications confirm that licensees have met their responsibilities and will assist the Commission to achieve a more accurate licensing database. Moreover, we believe that canceling Petitioner's licenses for legitimately operating facilities that were constructed in accordance with the terms of their authorizations would frustrate the purpose of our certification requirement.

¹³ See File Nos. 20030129AAC, 20030129AAD, Exhibit 1.

¹⁴ *Id.*

¹⁵ 47 C.F.R. § 74.34.

¹⁶ 47 C.F.R. § 21.43.

¹⁷ 47 C.F.R. § 21.44.

¹⁸ 47 C.F.R. § 21.44(a).

¹⁹ NCC's Petition specifically seeks a waiver of Sections 21.43 and 21.44 of the Commission's Rules which are applicable to MDS licensees. PACE and COPESD's Petitions, however, do not specifically seek waivers of Section 74.34 of the Commission's Rules, which is applicable to ITFS licensees. Nonetheless, we are treating PACE and COPESD's Petitions as requests for waiver of these provisions.

²⁰ See 47 C.F.R. § 21.19.

²¹ *Order*, 18 FCC Rcd at 2449 ¶ 4, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*).

7. In the interest of maintaining the integrity and accuracy of the licensing database, we have in the past granted requests for waiver and accepted late-filed notifications of timely construction if the licensee indicates that it met the construction deadline but requires a waiver of the rule governing timely filing of such notifications. We believe this situation is analogous to the situation recently addressed by the Wireless Telecommunications Bureau's Mobility, Broadband, and Public Safety and Critical Infrastructure Divisions (Divisions) in a joint Order responding to requests from the Industrial Telecommunications Association, the law firm of Blooston, Mordkofsky, Duffy & Pendergast, and the American Mobile Telecommunications Association.²² In that case, the Petitioners requested that the Commission allow Part 90 private land mobile radio (PLMR) licensees that had constructed their licensed facilities as required, but failed to file timely construction notifications an amnesty period of 180 days during which to file their construction notifications without having to file for an extension of time or request for waiver of the Commission's rules. The Petitioners argued that the PLMR licensees had recently been transitioned to the Universal Licensing System (ULS), and prior to such implementation, such licensees did not have to report their construction status on any routine basis.²³ Thus, they contended that the notification requirement was new and unfamiliar, and there was confusion about the applicability of the construction notification rule.²⁴ Noting that the purpose of the rule was not to cancel legitimate operations, but rather, to confirm that licensees had met their obligations, the Divisions concluded to grant a waiver of all pending late-filed notifications rather than grant a blanket amnesty for 180 days, as had been requested by the Petitioners. The Divisions took this action to assist the Commission in maintaining accurate licensing records. In light of this decision by the Divisions, we believe that granting the waivers requested by NCC, PACE, and COPESD is in the public interest in likewise assisting the Commission in maintaining accurate licensing records in the MDS and ITFS services. Thus, we conclude that Petitioners have shown good cause for a waiver of Sections 21.43, 21.44²⁵ and 74.34 of the Commission's Rules, as appropriate, to accept the late-filed construction notifications at issue.

8. We note that in 2003, the Commission undertook a comprehensive examination of our rules and policies governing the MDS and ITFS services in the 2500-2690 MHz band, in recognition of the spectrum's vast potential for broadband offering. On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rule Making* which fundamentally restructured the band to provide ITFS licensees with greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services.²⁶ Among other actions, the *MDS/ITFS R&O & FNPRM* migrates these services to the Universal Licensing System (ULS) that governs all WTB services. The ULS is helpful because it notifies wireless licensees by mail of impending construction deadlines at least ninety days prior to the relevant deadline. However, we underscore that once MDS and ITFS licensees become part of the ULS system, licensees must be mindful that the ULS-generated notification reminder letters are an aid provided by the Commission, and that not receiving a reminder letter is not a sufficient reason to not file the notification. While we agree that relief

²² *In the Matter of American Mobile Telecommunications Association Industrial Telecommunications Association*, Petitions for Amnesty Period for Part 90 Private Land Mobile Licensees to File Untimely Construction Notifications, *Order*, DA 04-1537, 19 FCC Rcd. 9666 (PSCID, MD and BD, 2004) (*AMTA Order*).

²³ *AMTA Order*, 19 FCC Rcd at 9668.

²⁴ *Id.*

²⁵ We will also waive, on our own motion, Section 21.44(b) of the Commission's Rules to allow consideration of the NCC Waiver Request as a late-filed request for reinstatement of its licenses.

²⁶ *BRS/EBS Order*, 19 FCC Rcd at 14165.

is warranted here, we emphasize that licensees are expected to be aware of, and fulfill, their regulatory obligations.

IV. CONCLUSION AND ORDERING CLAUSES

9. NCC, PACE, and COPESD have demonstrated that it would be in the public interest to waive the Commission's Rules and consider their late-filed certifications of completion of construction. Accordingly, we will grant their waiver requests and direct processing of their certifications.

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 21.19, 21.43 and 21.44 of the Commission's Rules, 47 C.F.R. § 21.19, 21.43, 21.44 that the waiver requests filed by Northwest Communications Cooperative on August 20, 2002 in connection with File Nos. 20020820AAG, 20020820AAH, 20020820AAI, and 20020820AAJ ARE GRANTED, and Sections 21.19, 21.43 and 21.44 of the Commission's Rules ARE WAIVED with respect to those certifications.

11. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 74.34 of the Commission's Rules, 47 C.F.R. § 74.34, that the waiver requests filed by PACE Telecommunications Consortium and Cheboygan-Otsego-Presque Isle Education Service District on January 29, 2003 in connection with File Nos. 20030129AAB, 20030129AAC and 20030129AAD ARE GRANTED, and Section 74.34 of the Commission's Rules IS WAIVED with respect to those certifications.

12. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 21.44 and 74.34 of the Commission's Rules, 47 C.F.R. §§ 21.44, 74.34, that the licensing staff of the Broadband Division SHALL PROCESS the captioned applications certifying completion of construction in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMUNICATION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau